

# THE HIGH COURT

[2023] IEHC 370

Record No. 2021/795JR

**BETWEEN**

**FRANCIS MCGUINNESS**

**APPLICANT**

**AND**

**A JUDGE OF THE CIRCUIT COURT**

**-and-**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**-and-**

**THE COMMISSIONER OF AN GARDA SÍOCHÁNA**

**-and-**

**THE COURTS SERVICE**

**RESPONDENTS**

**EX TEMPORE JUDGMENT of Ms. Justice Hyland of 24 May 2023**

## **Introduction**

1. This is a most unusual application for leave to seek judicial review in relation to an appeal against conviction in the District Court. Notably, there is no Order sought to be quashed. Rather, what is sought to be quashed might best be described as an interim ruling in the course of the appeal hearing, in circumstances where no final Order dealing with conviction and sentencing was ever made due to the retirement of the Circuit Court Judge.

2. Even more unusually, the relief is sought despite the fact that it is accepted by the respondents that in those circumstances, the appeal should be dealt with afresh by a new judge so that none of the actions complained of by the applicant have any legal effect. In short, *certiorari* is sought in respect of an interim ruling that has no legal effect.
3. Separately, the applicant seeks an Order of prohibition against An Garda Síochána from further arresting and charging the applicant with having neither a driving licence nor a certificate of insurance. The terms in which that relief is formulated suggest that the grant of same would immunise the applicant from ever being arrested and charged with the offences identified in any circumstances.
4. At the hearing yesterday counsel for the applicant sought to amend this relief substantially, although no application was made to amend that relief prior to the hearing of the leave application. I will deal with that below.

### **Judicial Review proceedings**

5. Before dealing with the sequence of events underlying this application, I should identify the procedural route by which this application comes before the Court. Leave was sought on 31 August 2021 before me at a vacation sitting. Because of the unusual nature of the application, I directed that the leave application be heard on notice to the respondents. The following affidavits were filed by the respondents: affidavit of 24 May 2022 by Garda Darragh Hynes, affidavit of 24 May 2022 by Inspector Brian Clune, affidavit of Denis Kennedy without a jurat or date, affidavit of Shay Keary on behalf of the Courts Service of 29 July 2022. A replying affidavit was filed by the applicant, Mr. McGuinness, of 17 October 2022. There was a grounding affidavit and a verifying affidavit of Mr. McGuinness in

respect of the Statement of Grounds in the usual way and there was also a further affidavit sworn by him described as the second affidavit sworn 30 August 2021.

6. Because this is a leave application, albeit one on notice, the standard that the applicant must meet is low and that has been identified in *G v DPP* [1994] 1 IR 374 and reiterated in *O'Doherty v the Minister for Health* [2022] IESC 32. The fact that it is on notice to the respondents does not alter the threshold to be met.

### **Factual background**

7. It must be said that the sequence of events preceding the application for leave in August 2021– and indeed after it – were highly unusual and unsatisfactory from the applicant’s point of view. In short, on 29 January 2018, the applicant was convicted at Swords District Court of two road traffic offences committed in 2013, namely driving without holding a driving licence and driving without insurance. He was fined and disqualified from holding a driving licence for a period of 3 years.
8. He appealed against those convictions and the matter came on for hearing on 1 March 2019. He or his legal team were not present. The Court affirmed the District Court Order.
9. The applicant was permitted to reinstate his appeal, and this was done on 15 March 2019. The matter came before the Judge in the Circuit Court on a number of occasions, including 1 July, 9 July, 12 July, 16 July 2019 and 23 November 2020. The Circuit Court Judge retired in 2022.
10. On 9 July, she engaged in a consideration of the penalties applicable to the offence of driving without insurance, and whether disqualification was mandatory. Under the statutory provisions, that depended on whether an applicant was treated as a first-time offender or not. A question arose as to whether convictions that the applicant had for no insurance in 1985 and 1987 were required to be taken into

account in considering his status as a first-time offender. The Judge indicated that she was satisfied he was not insured and that she was going to convict him of that but went on to say that she was looking at the penalties. She indicated she would impose the minimum conviction of two years disqualification as she had no discretion in the matter following the High Court decision *DPP v Petrovici* [2018] IEHC 734. She agreed to stay that Order pending clarification as to whether the decision in *Petrovici* was being appealed. No Order was drawn up at that stage.

11. On 12 July the matter returned before her and there were further submissions made as to the appropriate penalty and the question of spent convictions. A suggestion was made by counsel for the applicant that there ought to be a case stated to resolve the legal issues outstanding. The matter was further adjourned to 16 July 2019.
12. On 16 July the Circuit Court Judge records that she had made a ruling that the applicant was not insured because there was no valid insurance in place, and further extensive submissions were made on the appropriate sentence. After long argument, the trial Judge adjourned the matter again to allow submissions to be provided in respect of whether a case should be stated.
13. It appears that the matter then came back before her on 23 November 2020 and that the applicant's solicitors were not notified of the hearing. I will deal with the detail of that hearing shortly but the next communication that the applicant received was an email from Garda Hynes in April 2021, who informed him that the matter had been in the Courts of Criminal Justice and had been adjourned to 19 April 2021, and that he was cautioned to attend. I should say that that account is not uncontroverted. There was evidence from Garda Hynes that he contacted the applicant on an earlier date to inform him of the matter. That is controverted by the applicant. I am not going to resolve that conflict since, for the purpose of this

application, I should take the applicant's case at its highest in relation to the factual situation. Therefore I will treat the matter as one where there had been no notification up to 12 April 2021, and was then adjourned to 19 April 2021.

14. On 19 April Judge Hutton was sitting and was told that the Circuit Court Judge had seisin of the case and the matter was adjourned. However, the matter did not go back to the Circuit Court Judge but ultimately came before Judge Berkeley on 28 April 2022 who appears to have expressed the view that the Circuit Court Judge had indicated to her the matter had been finalised.
15. Following that hearing, for reasons that no one can explain, two orders were drawn up convicting the applicant of both offences. In respect of the no insurance charge, he was ordered to pay a fine of €750 and disqualified for three years. The respondents brought a motion seeking to set aside that Order under the slip rule on notice to the applicant.
16. On 13 October 2022 the case was entered under the slip rule and although the Order was not before the Court initially yesterday at the hearing, it was provided by the end of the day to all parties, including the applicant. I was provided with a copy of that Order by the registrar who was sitting yesterday. That Order states that Judge Berkeley ordered as follows "*The Court makes no order and confirms that she made no Order on 28 April 2022*".
17. The net position is now that everyone accepts that no sentence was passed on the applicant but the parties draw very different conclusions from that state of affairs. The applicant says his appeal should not now proceed and the stay on the District Court decision should stay in place and the respondents say a fresh appeal should take place.

**Decision of 23 November 2020**

18. Returning to the events of 23 November 2020, I should note that the applicant only received the transcript of that hearing after the leave application had been brought. Accordingly, this leave application was brought in ignorance of many of the relevant facts.
19. On that date the Circuit Court Judge noted that the *McGuinness* case was listed alongside another case, and she also noted that no submissions had been received in advance from the applicant. She observed that the applicant's barrister might be indisposed. She indicated that whatever decision she reached in relation to the other matter, could apply to his matter and that the issue was whether there should be a case stated or not.
20. Written submissions had been submitted by the party in the other case where a similar issue presumably had arisen, as well as by the prosecution. The Judge indicated that the matter had been adjourned in July 2019 to allow the parties to make submissions in relation to a case stated. She proceeded to give a decision on the question of the case stated, rejecting the application for same and holding that the matter had already been dealt with in *Petrovici*.
21. Crucially for the purposes of this application, she indicated that there was a sentencing issue remaining in the applicant's case and she asked the solicitors for the State to communicate with his solicitors to identify the outcome of her decision. No Order was drawn up following that hearing.

**Decision in respect of certiorari of the decision of 23 November 2020**

22. The primary focus of the applicant's case is and remains the decision of 23 November. The applicant argues I should determine his arguments in respect of the illegality of that decision and of that process, given his absence from the hearing, and of the failure to give reasons, although he cannot identify precisely how this

would be of benefit to him given that no final decision was reached on sentence by the trial Judge. However, he says it would assist him in his damages application and I will deal with that below.

23. All the respondents strongly argue that the matter is moot and that the Court should not determine a moot. They say that because the appeal was never finalised in circumstances where the applicant was not sentenced by the Circuit Court Judge, and because the matter requires an entirely fresh appeal process, the ruling of 23 November has no legal effect and therefore the grant of relief would be entirely futile. They say the applicant already has already in substance the relief that he seeks *i.e.*, that the ruling in relation to the case stated be set aside and the case is therefore back on track. It is argued that any rehearing of the case enures to the benefit of the applicant because he can make any argument he wishes in the context of a fresh hearing, including applying for a case stated. It is argued that events have overtaken his grievance.
24. The above sequence demonstrates unambiguously that the appeal never proceeded for sentencing. The applicant complains with considerable justification of his exclusion from the final hearing in relation to the case stated and the failure to notify him in this respect both before and after the hearing. If the decision made on 23 November 2020 had some legally binding effect on him, then the failure to hear him would very likely have led to a quashing of that decision given the obligation in administrative law to hear persons before making a decision with legally binding consequences for them.
25. However, in this case the decision has no consequences because the failure to complete the appeal and make a decision on sentencing, and the subsequent retirement of the Circuit Court Judge, means that her decision of 23 November

2020 has no legal effect on the applicant. It would therefore be futile to grant *certiorari* of the decision of 23 November since that decision has no legal effect. There is no Order in existence that might be quashed. Judicial review cannot lie in respect of a decision that has no legal effect. There is no unfairness visited upon the applicant in circumstances where he is entitled to a fresh appeal and can raise all issues again, including that in relation to whether there ought to be a case stated.

26. The applicant makes the point that a court should not be able to avoid scrutiny of a decision by simply failing to draw up orders. I fully take that point and if the decision or ruling of 23 November had a legally binding effect, I accept that the absence of an Order in that respect could not render it immune from judicial review. But here the ruling did not have a legally binding effect for the reasons identified above.

27. For those reasons, I do not consider the applicant has met the low barrier in respect of leave for judicial review in relation to the decision of 23 November 2020. The matter is now moot and therefore there is no reason to grant judicial review. The case law is quite clear that where judicial review would serve no purpose, leave should not be granted. For the same reasons I conclude that the applicant has not made out an arguable case and/or that the case he seeks to make is moot in respect of the declarations relating to the decision of November 2023 namely reliefs two and three.

28. I turn now to the other substantive relief sought by the applicant, *i.e.*, prohibition.

What is sought in the Statement of Grounds is the following:

*“An Order of Prohibition by way of an application for Judicial Review preventing the servants and/or agents of the third named respondent from*



*further arresting and charging the Applicant with having neither a driving licence nor a certificate of insurance”*

29. The key features of that are the following: relief is sought against An Garda Síochána in respect of arrest and charge and the relief is sought in perpetuity. Notably, that relief is not addressed at all to the prosecution of the appeal against the District Court conviction.
30. The first time that it was intimated that in fact an entirely different Order of prohibition was being sought was at the hearing yesterday. Counsel indicated that the relief should be against the DPP and should seek prohibition of the prosecution of the appeal or an injunction restraining the prosecution of the appeal. It is important to identify the consequences of any such Order. The applicant appealed against the conviction of the District Court and as such the appeal carries with it an automatic stay on the conviction. Therefore, were the applicant to be successful, the appeal would remain undetermined, and the District Court conviction would be permanently stayed. Counsel for the first and second respondents pointed out that, in addition, the appeal is in fact that of the applicant. Therefore an Order of prohibition on the respondent or the DPP advancing the appeal might not in fact be meaningful given that it is the applicant’s appeal. In any case, the precise wording of the different Order of prohibition was not identified.
31. I am faced with the very considerable difficulty that the applicant has effectively looked for an entirely different Order on the day of the contested leave hearing. As noted, the relief that is in the Statement of Grounds is squarely against An Garda Síochána and is unlimited in scope or time and has not addressed the question of the appeal. That is the application that I put the respondents on notice of by Order of 31 August 2021, and that is the application the respondents have come to meet.

The written submissions of the applicant squarely stand over that relief and make no suggestion that any other form of prohibition is required. Just to emphasise how different the relief sought in the papers is from that which was mooted at the hearing, if the relief sought in the pleadings was granted, there would be nothing to prevent the DPP taking steps in respect of the hearing of a fresh appeal.

32. The three sets of respondents have filed legal submissions on the basis of what is in the Statement of Grounds. Because no reference was made in the submissions by the applicant to any revised Order of prohibition, none of the respondents were in a position to respond to any such application in their written submissions.
33. Nor was there any correspondence between the solicitors as to a proposed amendment to the Statement of Grounds and an identification of the proposed relief. Yet there was no impediment to the applicant doing so well in advance of this leave hearing, since the full facts have been known to him in this respect since he obtained the transcripts of the Circuit Judge, whether those of July 2019 or those of November 2020. No excuse was proffered for this failure.
34. In the circumstances I am not granting leave for the Order of prohibition that is identified in the Statement of Grounds since counsel made it clear that that was no longer being pursued. Nor will I permit the applicant to entirely reformulate the relief sought in this respect at the hearing of a contested leave application, where no efforts were made to identify an alternative relief and no application was made to amend the Statement of Grounds. It would completely undermine the purpose of a contested leave application were I to permit the applicant to make the application at the contested leave application in circumstances where the proposed amendments had not even been identified.

35. Moreover, because this relief was not identified in the Statement of Grounds, critically there is no evidential basis to support an application to prohibit any further steps being taken by the DPP in respect of the applicant's appeal. Relevant jurisprudence indicates that a trial can be prohibited on grounds of delay either where there is a risk to the fairness of a trial or there has been a breach of the right to trial with due expedition. It seems that exceptionally it may be possible to prohibit a trial even absent delay where there is a real risk to the fairness of a trial and that risk cannot be avoided by appropriate rulings and directions on the part of a trial Judge.
36. Had the applicant set out an evidential basis for obtaining leave to seek an Order of prohibition in respect of the continuation of the appeal, then I would be in a position to decide whether the applicant had surmounted the low bar necessary to obtain leave to seek such an Order. However, in this case, there is no such evidential basis identified. The applicant does not appear to be asserting that he cannot obtain a fair trial because of delay *per se*. Rather, his counsel argues that the delay has scuppered his right to fair procedures. But there is a focus in his affidavits only on the unfairness of the way in which matters proceeded before the Circuit Court Judge. There is no explanation as to why that means it would be procedurally unfair for him to prosecute his appeal afresh. I have already identified that those flaws, while most unfortunate, did not affect his legal rights or entitlements in circumstances where they do not have any legally binding effect. There is no identification by the applicant in his affidavits as to why a fresh trial by a new Circuit Court Judge would be unfair.
37. Moreover, insofar as delay is put in issue, the applicant has failed in his papers to identify the relevant period of delay, why that would prejudice his appeal and what

his role in the delay is. The applicant does not explain at all why he did not take any steps to prosecute what was, after all, his appeal. Between July 2019 and 19 April 2021, a period of almost two years, as far as the applicant was aware on his case nothing had happened. Yet the applicant, knowing that the Circuit Court Judge had said that she would decide upon the case stated issue and had sought written submissions on it, neither provided the submissions nor took any steps to ascertain the state of play. In those circumstances it is difficult to see how he can complain of delay during this period if that is indeed what he is doing.

38. Further, he does not identify any prejudice to him caused by virtue of delay in respect of a fresh hearing of his appeal, such as a loss of evidence or some other detriment caused by the passage of time. Nor does he explain why a trial Court could not remediate any prejudice he claims to suffer to ensure the trial proceeds in a constitutional fashion.
39. In those circumstances the applicant has failed to identify an evidential basis for seeking an Order of prohibition in the entirely altered terms he identified yesterday.
40. In those circumstances, where there is not even an application to amend his Statement of Grounds to seek a different Order of prohibition than the one sought and no evidential basis to support same, I cannot grant any relief in relation to the prohibition of the appeal.

**Damages/arrests of the applicant**

41. Returning to the chronology of events, on 7 July 2021 and on 9 August 2021 the applicant was arrested for driving without insurance. This was apparently because the record of conviction on the Garda database, PULSE, had not been updated to reflect that his appeal which had previously been struck out had in fact been

reinstated. There was a further arrest in November 2021 after the PULSE record had been updated.

42. The applicant argues in relations to the allegations of mootness made by the respondents that he requires a decision on the validity of the ruling of 23 November 2020 in order to support his claim for damages. In respect of that claim, he has focused heavily upon the three arrests that took place and focused in particular on the arrest of 27 November 2021. He says he requires a decision not just on the validity of 23 November ruling but also on the other matters in his Statement of Grounds.
43. He relies in this respect on a letter from his solicitor of 20 December 2021 to the CSSO. Strangely, this letter was not exhibited by him in his affidavits but by An Garda Síochána in one of their affidavits. The letter alleges that he was at his yard in Swords when three members of An Garda Síochána entered his property that he was bundled to the ground and was put in handcuffs until two further guards arrived. He was put in the back of a Garda car and brought to Swords Garda Station. He says that he was told to go after some time and in the letter, it is asserted that he was treated like dirt by An Garda Síochána. He identifies that his shoulder was injured, that he went to Navan Hospital that evening and that he was in ongoing pain and discomfort.
44. A very different account of that arrest is given at BC8 being an email from Mr. Elliot where he describes the applicant as being obstructive, resistant and aggressive towards gardaí and being brought to Swords Garda Station where it was found that Mr. McGuinness had appealed his disqualification and it was still before the courts. It was said that the gardaí were unable to carry out checks on the status

of Mr. McGuinness by the roadside because he was so obstructive and posed an immediate threat to the safety of the gardaí.

45. As set out in the affidavit of Inspector Clune it appears that, following the reinstatement of his Circuit Court appeal on 15 March 2019, PULSE was not updated to reflect the stay on the disqualification Order. When this was discovered, a warning was placed on the PULSE system on 9 September 2021. At paragraph 17 Inspector Clune identifies that the Order of 15 March 2019 was only updated on the CCTS system, being the Courts Service system that interacts with the PULSE system, on 12 July 2019. Inspector Clune identifies that the charges arising from the arrests in July and August 2021 either have been withdrawn or will be withdrawn.
46. It is now clear from these affidavits that the first two arrests were because the PULSE system was not updated to reflect the appeal, and not because of any frailty in the appeal process or because of any decision that was made by the Circuit Court Judge on 23 November 2020. In fairness to the applicant, he was not aware of this at the time that he brought these proceedings. Therefore, it is difficult to see how the resolution of any of the grounds identified in the Statement of Grounds will affect the issue of liability of damages for misfeasance in relation to the arrests, as none of those grounds relate to the failure to update PULSE. The third arrest took place after the correction of the PULSE system but again it is hard to see how any of the issues relating to the conduct of his appeal could be relevant to any complaints he wishes to raise in relation to his arrest.
47. Apart from the arrest, the applicant's affidavits do not identify any evidence of misfeasance by the other respondents. At the hearing it was identified that no allegation of misfeasance is made against the Circuit Court Judge.

48. In those circumstances, the desire to bring an action for damages for misfeasance against An Garda Síochána and possibly the other respondents cannot in my view justify me granting leave for judicial review, where the issues that the Court will be required to determine if leave is granted are not material to any claim for damages. In those circumstances I refuse to grant leave in respect of the damages ground.
49. I equally reject the argument that leave should be granted in respect of the other reliefs simply to permit a damages claim to be brought in the context of these proceedings. Judicial review proceedings cannot be used as a vehicle to carry a damages claim where the proceedings do not otherwise meet the threshold for leave and/or are moot.

**Other reliefs**

50. At paragraph 4 of the Statement of Grounds, a relief is sought which effectively appears to be an application for a declaration that the failure to notify the applicant of the decision of 23 November 2020 breached his rights because, had he been notified, the matter could have been resolved. I return to the same point made above here: because the decision of 23 November 2020 has no legal effect, the failure not to notify him of it cannot have a legal impact. The grant of judicial review in respect of this relief would therefore be futile given that the matter is now moot. In those circumstances I will not grant relief in respect of this ground.
51. I take a similar approach to relief number five. That appears to be focused upon the alleged failure of the Courts Service to notify him of the decision of 23 November. He argues that he might have judicially reviewed the decision if he had known of it at that stage. But the applicant did become aware of the decision and did judicially review it and no point has been taken in respect of a delay in challenging

the decision. In any case as identified above, the decision of November has no legally binding effect. In the circumstances, the grant of judicial review in respect of this relief would therefore be futile given that the matter is now moot.

52. I should address the specific position of the Courts Service. It appears that the vast majority of the reliefs sought are not sought or are not properly sought as against the Courts Service. Insofar as complaints are made in relation to the hearing on 23 November 2020, those complaints can only be made against the Circuit Court Judge and not the Court Service, since the conduct of hearings is not a matter for the Court Service. Similarly, the Order of prohibition is not a matter that concerns the Court Service. But given that I am not granting leave in relation to any of the grounds for the reasons set out above, it does not appear to be a good use of time to seek to differentiate the position of the Court Service from the other respondents. That might have been necessary were I granting leave against the other respondents.

### **Matters not pleaded**

53. The applicant has identified that he would also like to seek to challenge the decision to convict him by the Circuit Court Judge made on 9 July 2019, as he characterises it. He argues that it was an impermissible decision because it took into account his previous convictions. Again, this has not been pleaded or identified in any way in the Statement of Grounds, despite the fact that when the application for leave was brought, the applicant, his solicitor and his counsel were aware of what transpired on 9 July 2019 given that they were present. Even if one took the view that it was only when the DAR for 9 July was available could the applicant formulate this ground, no steps were taken prior to the leave hearing on notice identifying that it was intended to seek a new relief in this respect. No application to amend the



Statement of Grounds have been brought. As identified above, it would wholly undermine the leave on notice process if an applicant could bring forward new reliefs on the day of the hearing.

54. In any case, the same issues arise in relation to the decision of 9 July as they do in respect of 23 November. The transcript makes it clear that the Circuit Court Judge had not finalised any Order because she had not yet sentenced the applicant. The decision or ruling she gave in this regard has no legally binding effect because, as identified above, the matter never came to a conclusion and the applicant is therefore entitled to run his appeal again from the start before a new Circuit Court Judge.
55. The applicant also sought to make an argument in relation to a breach of the principle of good administration. That was not pleaded and therefore cannot be entertained.
56. Equally, the applicant sought to make an argument about an overlong interval between sentence and conviction. That is not a point ever made in the Statement of Grounds although the applicant had the material to seek to amend his Statement of Grounds from the date he received the transcript of 9 July 2019 which I understand happened sometime in 2022. He cannot therefore now seek to add a new point in that respect.

### **Conclusion**

57. I should finish by observing that there were undoubtedly significant procedural flaws throughout the sequence of events that are described above, and these may be relevant to the costs of this application. As the applicant points out, it was not

the fault of the applicant that the trial Judge took the view that she had finalised the matter and that it did not go back to her as it ought to have. Equally, it was not his responsibility that he was not there on 23 November 2020. However, the existence of procedural flaws *per se* are not sufficient to give rise to an arguable case in judicial review alone. An arguable case and a live controversy must be identified where the disposition of same would benefit the applicant. That is not the case here for the reasons I have identified above and therefore I refuse leave on all grounds.

58. There are a number of other grounds and reliefs sought but all of those are ancillary to the reliefs discussed above and therefore leave in respect of same will also be refused.